MEMORANDUM

TO: Reporters, Editors, Producers and Interested Parties

FROM: American Medical Association

DATE: December 15, 2018

SUBJECT: Texas v. Azar Decision

Judge Reed O'Connor's decision is a stunning display of judicial activism. Judicial power does not extend to settling policy disputes or exercising general supervision over the other branches of the federal government. Congress declined to repeal the ACA on more than 70 occasions. Yet, this judge has stepped in and single-handedly done has what Congress chose not to do – with a weak, unprecedented interpretation of "standing," a failure to grapple with binding legal precedent, and an indefensible understanding of the interplay between the ACA, the Supreme Court's decision in NFIB, and the TCJA. This decision violates multiple precepts that guide and limit the exercise of the judicial power – and it sets a dangerous precedent that invites politicians to resort to the unelected, life-tenured judiciary when they cannot achieve their political goals through the democratic process. Elected and accountable officials at the federal and state level continue to debate how best to ensure the provision of quality health care to the American people.

1. *The Decision Will Wreak Havoc on American Health Care If It Were Left to Stand*

Current Law Should Remain in Place Pending Resolution of All Appeals

If upheld, the consequences of Judge O'Connor's decision will be staggering. The ACA expanded access to affordable, quality health insurance, and millions of Americans have gained coverage under the statute. The decision will strip health care from tens of millions of Americans who depend on the ACA; result in higher insurance costs; and sow chaos in the nation's health care system.

The decision reverses the historic gains in health insurance coverage that have been achieved since the implementation of the ACA, which have benefited millions of patients and the American health system.

Empirical research demonstrates that the lack of insurance contributes to premature deaths, worse health outcomes and preventable patient suffering.

2. *Plaintiffs Lack Standing*

The decision disregards the fundamental doctrine of "standing," which is intended to ensure that courts confine themselves to their properly limited role, and avoids embroiling courts in political disputes that our Constitution assigns to the democratically accountable branches of government.

As the judge recognized, the American Medical Association (AMA) explained why the plaintiffs in this case did not have standing to bring their case. The plaintiffs do not have standing because they have not suffered any real, concrete injury. They do not have to pay a penny in tax if they choose not to obtain health insurance. That unavoidable fact makes clear that the plaintiffs simply seek to change the federal government's health care policy through the courts, rather than through the legislature.

In rejecting those common-sense arguments, Judge O'Connor offered an unprecedented theory of standing—that parties may bring suit to free themselves from what they subjectively view as "arbitrary governance." No court has ever recognized such a radical theory.

3. *The Minimum Essential Coverage Provision Remains a Constitutional Exercise of Congress's*

Taxing Power

Judge O'Connor concluded that, in light of the TCJA, the Individual Mandate in the ACA is no longer fairly readable as an exercise of Congress's Tax Power and, thus, the ACA is unconstitutional. His logic is fatally flawed.

A law need not raise "some revenue" to qualify as a tax under Congress's taxing power. All that is required is that the authority to tax be preserved, even if no revenue is actually raised. That is precisely what Congress did when it amended § 5000A. By keeping the minimum coverage requirement and its provisions imposing a tax, but only reducing the amount of that tax to $0, Congress preserved the statutory power to tax.

Judge O'Connor ignores a critical Fifth Circuit case on this point (United States v. Ardoin, 19 F.3d 177 (5th Cir. 1994)), which is a sign he has no answer for it. The AMA cited that decision again and again in its amicus brief, but the judge did not bother to address those arguments—or the binding decision of the court of appeals that he is required to follow. The NFIB case cited by the judge did not displace judicial precedent (i.e. Ardoin) that a law is constitutional where taxing authority still exists, but is merely not exercised.

4. *The Minimum Coverage Provision Is Severable from the Remainder of the ACA*

The severability inquiry turns on congressional intent.

The actions of the 2017 Congress leave no doubt about its intent: Congress reduced to zero the tax liability for failing to have minimum essential coverage, but it left the ACA otherwise unchanged. Congress thus already decided that the remainder of the law's provisions—the protections for people with pre-existing conditions, the Medicaid expansion, and the rest of the law—should continue to be enforced as they were before the Tax Cut and Jobs Act of 2017 was enacted.